Colonial Metal Spinning and Stamping Co., Inc. and Regency Metal Stamping Co., Inc. *and* Metal Spinners and Silver Plated Hollowware Workers' Union, Local 49E, Service Employees International Union, AFL–CIO. Cases 29–CA–15562, 29–CA–15813, and 29–CA–15964

January 7, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 24, 1992, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a brief in support of the exceptions and the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Colonial Metal Spinning and Stamping Co., Inc., and its alter ego, Regency Metal Stamping Co., Inc., Brooklyn, New York, their officers, agents, successors, and assigns, shall take the action set forth in the order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Recognize and, on request, bargain with the Union as the exclusive representative of all the employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment by continuing to apply the terms and conditions of its contract with the Union which was effective September 1, 1989 through August 31, 1992, until the Respondent and the Union reach a good-faith impasse or execute a new collective-bargaining contract, or the Union refuses to bargain in good faith.''

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Make employees whole with interest, for any losses suffered as a result of the Respondent's failure to make contractually-required insurance and retirement fund payments, in the manner set forth in the remedy, as modified.''

3. Substitute the attached notice in English and Spanish for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate the terms and conditions of our collective-bargaining agreement with Metal Spinners and Silver Plated Hollowware Workers' Union, Local 49E, Service Employees International Union, AFL–CIO (the Union) or withdraw recognition of the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All employees employed at our Brooklyn, New York facility, including journeymen, spinners, tool and die makers, machinists, polishers, die setters, shipping clerks, apprentice spinners, power and draw press operators, general helpers and packers, but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail to honor our obligations under our collective-bargaining agreement with the Union by not making required monthly payments to the Insurance Fund and the Retirement Fund; by not paying the general wage increase called for in that agreement, or the vacation, holiday, and sick pay benefits; by not forwarding to the Union dues deducted from employee wages; by failing to honor the seniority provisions in not reinstating employees, based on their seniority, on their return from sick leave; or by effectively negating the impact of the safety provisions of the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise

[1] The judge inadvertently referred to Isaac Tyrnauer as ''Irving.''

[2] The General Counsel has excepted to the judge's failure to order that the Respondent post the notice to employees in Spanish as well as in English. As the majority of the Respondent's employees are Spanish speaking, we find merit to the General Counsel's exception and will require that the notice to employees be printed in Spanish and English.

The General Counsel has excepted to the judge's failure to specify the exact date of reinstatement for Carlos Asang and Carlos Padin. Because the record is not sufficiently clear to allow us to state with certainty the exact date, we shall leave that determination for the compliance stage of this proceeding.

The General Counsel requests that the Board clarify that the Respondent's bargaining obligation continues beyond the August 31, 1992 expiration of the contract. We find merit to this exception and shall modify the recommended Order accordingly.

We shall also order the Respondent to make the unit employees whole for any losses thay may have suffered as a result of the Respondent's failure to make the contractually required fund contributions. See *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

of their rights under Section 7 of the National Labor Relations Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of all the employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment by continuing to apply the terms and conditions of our contract with the Union which was effective September 1, 1989, to August 31, 1992, until we reach a good-faith impasse or execute a new collective-bargaining contract, or the Union refuses to bargain in good faith.

WE WILL make all payments to the Insurance Fund and to the Retirement Fund, as required under our contract with the Union.

WE WILL make our employees whole for any losses they may have suffered as a result of our failure to make contractually required fund payments, with interest thereon.

WE WILL forward to the Union, with interest, all union dues deducted from employee wages which have not been remitted.

WE WILL offer immediate reinstatement to Carlos Asang and Carlos Padin, and make them whole for all losses they incurred by reason of our failing to reinstate them on their return from sick leave in January 1991, with interest thereon.

WE WILL pay employees in the unit described above, with interest, the general wage increase due under our contract with the Union, and all benefits thereunder including holiday pay, vacation, and sick leave.

WE WILL notify the Union in writing that we will meet with it on request to discuss the matter of providing safeguards to make our machinery safe to operate.

COLONIAL METAL SPINNING AND STAMPING CO., INC. AND REGENCY METAL STAMPING CO., INC.

David S. Cohen, Esq., for the General Counsel.
Robert C. Dorf, Esq. (Fertig & Dorf), of New York City, New York, for the Respondents.
Ira Cure, Esq. (Lewis, Greenwald, Kennedy, Lewis, Clifton & Schwartz, P.C.), of New York City, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint in these cases, which were consolidated for hearing and amended at the hearing, alleges that Regency Metal Spinning Co., Inc. (Regency) is the alter ego of Colonial Metal Spinning and Stamping Co., Inc. (Colonial) and that Colonial-Regency has failed to bargain collectively with the Charging Party, Metal Spinners and Silver Plated Holloware Workers' Union, Local 49(E), Service Employees International Union, AFL–CIO (the Union) in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). In particular, Colonial-Regency is alleged to have (a) repudiated the collective-bargaining agreement it has with the Union and withdrawn recognition of the Union as the exclusive collective-bargaining representative of its employees and (b) failed to honor its contractual obligations to the Union by not:

(i) making payments to the Insurance Fund and the Retirement Fund,
(ii) paying a general wage increase along with vacation, holiday, and sick pay benefits,
(iii) remitting to the Union dues deducted from the wages of its employees.
(iv) reinstating two employees, Carlos Asang and Carlos Padin, upon their return from sick leave.
(v) maintaining its equipment in safe condition.

The answer filed by Colonial and by Regency denies that Regency is the alter ego of Colonial and also denies the alleged repudiation of the agreement between Colonial and the Union.[1]

The hearing was held in Brooklyn, New York, on December 11 and 12, 1991. Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

Colonial has been engaged at its Brooklyn, New York facility in the manufacture, sale, and distribution of metal stampings used by companies in the lamp industry. As discussed infra, Regency took over that business in October 1990. In the 12-month period preceding that takeover, Colonial derived in excess of $50,000 from the sale of its products to a customer located in New Jersey. Since October

[1] The answer also averred that the complaint should be dismissed as the Union can submit to an arbitrator the issues in this case pursuant to the grievance-arbitration provisions of the agreement between Colonial and the Union. That contention lacks merit as Regency has refused to be bound thereby. See *Regional Import & Export Trading Co.*, 292 NLRB 206 (1988).

[2] The Union filed a posthearing motion, one part of which related to its request that a copy of the decision, in the matter of *Lippel v. Colonial*, Index No. 22839/91 before the Supreme Court of New York, be received in evidence. That part of the motion is granted as it relates to two of the issues in this case. The court there confirmed an arbitration award which found that Regency is the alter ego of Colonial and that the failure to reinstate the two employees on sick leave, Asang and Padin, controverted its contract with the Union. See *American Commercial Lines*, 291 NLRB 1066 at fn. 2 (1988). The Union, in its motion, also sought partial summary judgment on the alter ego issue and as to Asan's and Padin's reinstatement. General Counsel's letter of March 12, 1992, opposed this part of the motion. Based on the rationale of the case cited therein, *Field Bridge Associates*, 306 NLRB 322 (1992), I find no merit to the Union's effort to apply the doctrine of collateral estoppel to those two issues. Therefore, I deny the motion for partial summary judgment.

The motion and General Counsel's letter of March 12 are made part of the record herein, as C.P. Exhs. 7-A and 7-B, respectively.

1990, Regency has derived annually in excess of $50,000 from sales to that same customer. Colonial and Regency each meet the Board's nonretail standard for the assertion of jurisdiction.

The pleadings establish that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alter Ego Issue*

In 1985, Irving Tyrnauer purchased Colonial and since then, has been its sole stockholder and its president. Also since then, the Union has represented a unit comprised of all employees of Colonial, including journeymen, spinners, tool-and-die makers, machinists, polishers, die setters, shipping clerks, apprentice spinners, power and draw press operators, and general helpers and packers but excluding all office clerical employees, guards, and supervisors as defined in the Act. The last signed collective-bargaining agreement for this unit was executed on September 1, 1989, and was scheduled to terminate on August 31, 1992. The alleged unlawful repudiation of the collective-bargaining agreement is asserted to have occurred in 1990.

It was in late 1989 and in 1990 that Colonial fell behind in making monthly payments, as required by that agreement, to the Metal Spinners Insurance Fund and to the Metal Spinners Retirement Fund. As to the former, Colonial was delinquent from March through September 1990 and, as to the latter, from October 1989 to September 1990. Further, although it had deducted union dues from the wages of its employees, it did not remit those moneys, as called for by the agreement, to the Union for the period May through September 1990. Colonial's position is that it was impossible for it to comply with those contractual obligations because it did not have the money to do so.

Colonial acknowledged that its president, Isaac Tyrnauer, after having failed to renegotiate the contract with the Union, ''established Regency.'' Tyrnauer, himself, acknowledged that it was his ''business purpose in commencing Regency . . . to survive in some sort of an operation.'' Tyrnauer related further that Regency is not yet operating at the profit level that he is aiming at as ''[he] still has to give away a lot of stuff for very cheap [prices].''

Regency had been incorporated in about July 1990, as evidenced by one of its corporate resolutions signed then and by which it established a corporate bank account. Isaac Tyrnauer's name appears therein as Regency's secretary, notwithstanding his testimony that his brother Anhel Tyrnauer, is the sole owner, president, and only officer of Regency.

On or about October 1, 1990, some of the approximately 30 employees in the unit described above were told by Colonial's shipping manager, William Gonzales, that ''the company was going to change from Colonial to Regency.'' Shortly afterwards, the employees began to be paid by Regency checks instead of checks drawn on Colonial's account. They continued, without any hiatus, to work on the same machines, making the same products. Regency has used Colonial's list of customers without being charged for it. Isaac Tyrnauer continued to use the same office he had used as Colonial's president. His brother, Anhel,[3] the president of Regency, shares an outer office with two employees.

All of Colonial's employees, including managers and office clerical employees, were put on Regency's payroll and they continued to perform the same functions for Regency as they had performed for Colonial. Regency used Colonial's assets without cost. No written agreement between Colonial and Regency exists. Colonial holds title to the building occupied by Regency and Regency pays no rent therefor. There are many other common factors, such as Regency uses the same telephone number that Colonial used, the same attorneys, and the same accountant.

Isaac Tyrnauer has continued to perform the same functions for Regency that he performed as Colonial's president. In doing so, as his testimony reflects, he treats Regency as his own company. Thus, he used the phrase, ''my bank'' when alluding to Regency's bank account; he stated, ''I am ready to sign a contract [with the Union] for Regency''; and he referred to Regency's employees as ''my people.''

In determining whether one business entity is the alter ego of another, the Board considers a number of factors, none of which, by itself, is determinative. Among the factors are common management, ownership, common business purpose, the nature of operations, and supervision; common premises and equipment, common customers, i.e., whether the employers constitute ''the same business in the same market''; as well as the nature and extent of negotiations and formalities surrounding the transactions; whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.[4] The ownership of the two companies by members of the same family and the absence of any arm's-length dealings have been held to be circumstances that support a finding that the ownership of the two companies, for purposes of deciding alter ego status, is substantially identical.[5]

Applying these principles to the facts in this case, and noting that the operations of Colonial and Regency involved identical management, business purpose, equipment, customers, and employees, that they have substantially identical ownership under the *Advance Electric* criteria and that Isaac Tyrnauer set up Regency to avoid the costs of Colonial's contract with the Union, I find that Regency is the alter ego of Colonial.

B. *The Express Repudiation of the Union's Collective-Bargaining agreement*

Isaac Tyrauer testified that Regency has not applied to its employees the terms and conditions of the collective-bargaining agreement between Colonial and the Union. He also had told one of those employees in 1990 that that contract no longer was valid. Colonial-Regency thereby has repudiated that agreement and thus has failed to bargain collectively with the Union, as contemplated by Section 8(d) of the Act. See *McAllister Bros.*, 278 NLRB 601, 617 (1986).

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[3] Isaac Tyrnauer and Anhel Tyrnauer each own other businesses, not involved in this case.

[4] *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

[5] *Advance Electric*, 268 NLRB 1001 (1984). See also *Mid-Hudson Leather Goods Co.*, 291 NLRB 449 (1988).

C. *The Failure to Honor Certain Specified Provisions of That Agreement*

The agreement calls for Colonial-Regency to make monthly contributions to the two funds referred to above, to forward to the Union the dues deducted from employee wages, to give the employees a general wage increase, and to provide sick pay, holiday, and vacation benefits. Those obligations were not met, as alleged in the complaint. Colonial-Regency's assertion that it was financially unable to meet those obligations does not constitute a defense. See *International Distribution Centers*, 281 NLRB 742 (1986).

The agreement also provides that seniority shall govern as to the layoff and recalls of employees. Two unit employees, Carlos Asang and Carlos Padin, were on sick leave in early 1991. They were cleared by their doctors to return to work. When they reported to the plant in January 1991, they were not reinstated. At the hearing, Isaac Tyrnauer testified that they were not reinstated because they were sick too often. Less senior employees were working there. Further, Colonial-Regency hired new employees afterwards. When Asang and Padin protested that they had seniority rights entitling them to work, Tyrnauer told them that the contract with the Union is no longer valid. I find, based on the foregoing, that, had Colonial-Regency honored the contract's seniority provisions, howsoever imprecise they were phrased, Asang and Padin would have been reinstated, and that the repudiation by Colonial-Regency of those provisions, along with the entire contract for that matter, resulted in their not being reinstated.

The remaining allegation to be considered is that Colonial-Regency abandoned its contractual obligation to make necessary repairs on equipment safety features. The contract provides, as to safety, that a safety committee shall be formed to promote safe working conditions. The evidence proffered by the General Counsel is that the Union's steward repeatedly complained to Isaac Tyrnauer that the machines had defective handguards and that, each time, Tyrnauer's response in essence was that he would look into the matter. The contract language does not directly pertain to those unresolved complaints. However, the evasive responses by Tyrnauer to the steward's complaint discloses a total indifference to the underlying concern addressed by the contract provision—the need for safe operating equipment. Tyrnauer's brushoffs of the steward's concerns thereon were, effectively, repudiations by Colonial-Regency of the impact of the safety provisions of the Union's contract.

CONCLUSIONS OF LAW

1. Colonial with its alter ego Regency is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Colonial-Regency has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by having

(a) Repudiated the terms and conditions of its collective-bargaining agreement with the Union and withdrawn recognition of the Union as the exclusive collective-bargaining representative of the following appropriate bargaining unit:

> All employees employed at its Brooklyn, New York facility, including journeymen, spinners, tool and die makers, machinists, polishers, die setters, shipping clerks, apprentice spinners, power and draw press operators general helpers and packers, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Failed to honor its obligations under the collective-bargaining agreement it has with the Union by not making required monthly payments to the insurance fund and the retirement fund; by not paying the general wage increase called for in that agreement, or the vacation, holiday, and sick pay benefits; by not forwarding to the Union dues deducted from employee wages; by failing to honor the seniority provisions in not reinstating Carlos Asang and Carlos Padin on their return from sick leave; and by effectively negating the impact of the safety provisions of the agreement.

3, The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent, Colonial-Regency, has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, Colonial-Regency, shall be required to notify the Union in writing, that it recognizes the Union as the exclusive representative for the purposes of collective bargaining. It shall remit all payments to the insurance fund and to the retirement fund in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 at fn. 7 (1979). It shall reimburse its employees by paying the general wage increase, and vacation, holiday, and sick leave benefits and the Union with the dues it collected but did not transmit—all with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, the Respondent, Colonial-Regency will be ordered to offer Carlos Asang and Carlos Padin reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and shall make these employees whole for lost pay and benefits they normally would have received, less interim earnings, in accordance with the formula prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as set forth in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Colonial Metal Spinning and Stamping Co., Inc., and its alter ego Regency Metal Stamping Co., Inc., Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the terms and conditions of its collective-bargaining agreement with Metal Spinners and Silver Plated

[6] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Holloware Workers' Union, Local 49E, Service Employees International Union, AFL–CIO (the Union) and withdrawing recognition of the Union as the exclusive collective-bargaining representative of the following appropriate bargaining unit:

> All employees employed at its Brooklyn, New York facility, including journeymen, spinners, tool and die makers, machinists, polishers, die setters, shipping clerks, apprentice spinners, power and draw press operators, general helpers and packers, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Failing to honor its obligations under the collective-bargaining it has with the Union by not making required monthly payments to the insurance fund and the retirement fund; by not paying the general wage increase called for in that agreement, or the vacation, holiday, and sick pay benefits; by not forwarding to the Union dues deducted from employees wages; by failing to honor the seniority provisions of the contract in not reinstating Carlos Asang and Carlos Padin upon their return from sick leave; and by effectively negating the impact of the safety provisions of the agreement.

(c) In any like or related manner interfering with, coercing, or restraining its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that it is recognized as the exclusive collective-bargaining representative of the employees in the unit described above.

(b) Make all payments to the Insurance Fund and to the Retirement Fund, as required under its contract with the Union, in accordance with the remedy section above.

(c) Forward to the Union all union dues deducted from employees'wages which have not been remitted, with interest thereon as provided for in the remedy section.

(d) Offer immediate reinstatement to Carlos Asang and Carlos Padin, and make them whole for all losses they incurred by reason of the failure to reinstate them upon their return from sick leave in January 1991, with interest thereon—all as specified in the remedy section above.

(e) Pay the employees in the unit described above the general wage increase due under the contract with the Union, all benefits thereunder including holiday pay, vacations and sick leave, and the general wage increase, with interest as provided for in the remedy section above.

(f) Notify the Union in writing that it will meet on request with it to discuss the matter of providing safeguards to make its machinery safe to operate.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts owing under the terms of this Order.

(h) Post at its plant in Brooklyn, New York, copies of the attached notice, marked ''Appendix.''[7] Copies of the notice on forms to be provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places at these locations, including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

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[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''